

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77 6156

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 77-6156
Docket No. 77-6157

B
P/S

BROOKHAVEN CABLE TV, INC.; CAPITOL CABLEVISION, INC.; SAMSON CABLEVISION CORP.;
TELEPROMPTER ELECTRONICS CORPORATION; WARNER CABLE OF OLEAN, INC.; NATIONAL CABLE
TELEVISION ASSOCIATION, INC.; NEW YORK STATE CABLE TELEVISION ASSOCIATION; and
HOME BOX OFFICE, INC.,

Plaintiffs-Appellees,

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION,

Plaintiffs-Intervenors-Appellees,

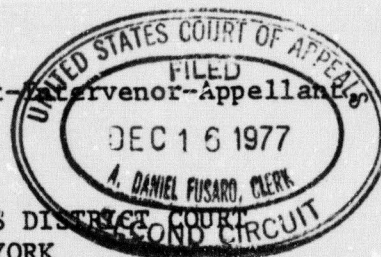
-against-

ROBERT F. KELLY, Chairman; JERRY A. DANZIG, Vice Chairman; MICHAEL H. PENDERGAST;
ELI WAGNER; and EDWARD J. WEGMAN, Commissioners of the NEW YORK STATE COMMISSION
ON CABLE TELEVISION,

Defendants-Appellants,

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,

Defendant-Intervenor-Appellant,



ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLEES

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BROOKHAVEN CABLE TV, INC., et al.,

Plaintiffs-Appellees,

and

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,

Plaintiffs-Intervenors-
Appellees,

-against-

ROBERT F. KELLY, et al.,

Defendants-Appellants,

and

NATIONAL ASSOCIATION OF REGULATORY
UTILITY COMMISSIONERS,

Defendant-Intervenor-
Appellant.

On Appeal from a Judgment of
the United States District Court for the
Northern District of New York

BRIEF OF PLAINTIFFS-APPELLEES

Preliminary Statement

This is an appeal from a judgment upholding the
policies of plaintiff-intervenor-appellee Federal Communi-

cations Commission ("FCC") preempting state and local regulation of the prices charged by cable television companies for movies, sports and other entertainment shown through the service known as "pay cable". The judgment below enjoins the Commissioners of the New York State Commission on Cable Television ("State Commission") from violating the FCC preemption by regulating the prices charged for such programs.

Pay cable is a young, growing national communications medium. It provides special programming, including movies and sports events not otherwise available on television, to subscribers who wish to pay for such entertainment. The FCC and other expert authorities have found that pay cable provides increased programming diversity, since it can satisfy minority tastes overlooked by advertiser-supported conventional television which must appeal to a mass audience. In order to permit the emerging pay cable medium to develop, the FCC has determined that it should be allowed to compete in a free marketplace -- against other communications media protected by the First Amendment -- without price controls. The chief issue in this case is whether the FCC had the power to make that determination.

The District Court (Port, S.D.J.) held that under the controlling decisions of the United States Supreme Court, as well as other precedents, such federal preemption is

clearly within the FCC's broad power to foster the development of new communications services and to promote the paramount public-interest goal of encouraging greater diversity of programs and program sources for viewers. Plaintiffs-appellees submit that the District Court's holding on this issue was clearly correct; that appellants' other arguments are without merit; and that the judgment below should be affirmed.

Questions Presented

1. Whether the FCC has sufficiently expressed an intention to preempt and prohibit state and local regulation of prices for pay cable programs, where it has explicitly stated and re-stated its preemption policy since 1969 in orders and other official pronouncements.

2. Whether the FCC's preemption and prohibition of regulation of the prices of pay cable is within the FCC's jurisdiction where the FCC policy is aimed at promoting diversity of programs and program sources in our national communications service, a goal held by the United States Supreme Court to be "reasonably ancillary" to broadcasting regulation and therefore within the jurisdiction of the FCC.

3. Whether the claim of defendant-intervenor-appellant ("NARUC") that the FCC's preemption policy was based on an insufficient record warrants reversal of the judgment below, where:

(a) NARUC participated in the proceedings in which the FCC adopted its preemption policy but did not appeal;

(b) NARUC did not raise this issue in the District Court; and

(c) In any event, there is ample support for the FCC's policy of preemption in order to allow this new medium to develop in competition with other First Amendment media not subject to price control.

The Parties

Plaintiffs-appellees ("plaintiffs") are five cable television companies which offer pay cable programs in New York State; two trade associations of cable television systems; and Home Box Office, Inc. ("HBO"), which is engaged in operating a national pay cable network by simultaneous transmissions of movies and other programs to cable television systems in New York State and throughout the country by means of satellites, microwave and other common carrier sources licensed by the FCC. (J.A., 36, 62)* Plaintiffs-intervenors-appellees are the FCC and the United States.

* References preceded by "J.A." are to the Joint Appendix.

Defendants-appellants are the five members of the State Cable Commission, which was created to supervise cable development in New York rather than allowing the State Public Service Commission to do so. Defendant-intervenor-appellant, NARUC, is an organization whose membership apparently consists of public service commissions. (J.A., 142-43) NARUC's standing here is open to question: the State Commission (not, apparently, a member of NARUC) is the only state agency in the United States which challenges FCC preemption of prices for programs on pay cable.

The Proceedings Below

This action resulted from a "Clarification of Commission Policy" ("Clarification") (J.A., 68-75), issued March 1, 1976, in which the State Commission undertook to regulate the prices charged to subscribers to pay cable service in New York State, despite the FCC's repeated preemption and prohibition of such price controls. Plaintiffs brought this action on April 7, 1976, in the United States District Court for the Northern District of New York, seeking declaratory and injunctive relief.

In their complaint (J.A., 9-23), plaintiffs allege that state regulation of pay cable prices is illegal and void on several independent constitutional grounds, including that

such regulation violates the First Amendment and that pay cable price controls are a denial of equal protection under the Fourteenth Amendment since no competitive media (e.g., conventional television, theaters and sports arenas) are subject to price regulations. The only claim at issue on this appeal is plaintiffs' first claim for relief (J.A., 15-20), in which they allege that the State Commission's action violates the Communications Act of 1934, 47 U.S.C. § 151, et seq., and the Supremacy Clause of the United States Constitution because the FCC has preempted regulation of pay cable prices and prohibited state and local price regulation.

The United States and the FCC intervened as parties plaintiff (See, J.A., 93-96) and both they and the original plaintiffs moved for summary judgment on the preemption claim (J.A., 32-62; 97-133). The State Commission and NARUC (See, J.A., 142-49) cross-moved for summary judgment on that claim (J.A., 63-74; 142-49). The District Court granted summary judgment in plaintiffs' favor in an opinion dated March 9, 1977 (J.A., 150-73). On May 12, 1977, a final judgment (J.A., 5-7) was entered.

The Opinion Below

Judge Port's opinion in the District Court carefully and fairly summarizes the relevant facts, the con-

tentions of the parties and the applicable law.

After explaining the nature of the young pay cable medium, reviewing the actions of the FCC and the State Commission, and reciting the contentions of the parties, the District Court focused on the issue of FCC jurisdiction. The District Court stated:

"The real issue simmers down to: Whether jurisdiction over pay cable rates is 'reasonably ancillary to the effective performance of the [FCC]'s various responsibilities for the regulation of television broadcasting'? U.S. v. Southwestern Cable Co., 392 U.S. 157, 178 (1968)." (J.A., 158)

The District Court then described the Southwestern Cable case, in which the "reasonably ancillary" test for FCC jurisdiction over cable television was first stated, and United States v. Midwest Video Corp., 406 U.S. 649 (1972), in which that test was extended to uphold a requirement by the FCC that cable television companies originate their own programs on channels not used for the retransmission of broadcast signals because that requirement was designed to promote "diversified programming." 406 U.S. at 666. The District Court, finding Midwest Video to be controlling, summarized its conclusion as follows:

"The FCC has found that pay cable TV increases programming diversity, an objective which has specifically been held to be reasonably ancillary to the FCC's responsibilities over broadcasting. United States v. Midwest

Video Corp., supra, 406 U.S. at 667-68. Pay cable TV's capability to satisfy minority tastes which are ordinarily overlooked by conventional television enhances and fortifies this objective." (J.A., 160; footnotes omitted.)

The District Court found the FCC's preemption of price controls for pay cable was "reasonably ancillary" to the goal of promoting diversity of programs and communications sources -- goals which are paramount to the regulation of broadcasting and therefore within the FCC's ancillary jurisdiction.

After disposing of appellants' claims as to ripeness, mootness and standing (claims which have been abandoned on this appeal), the District Court granted plaintiffs' motion for summary judgment.

We respectfully submit that the reasoning of this District Court is sound and, indeed, unanswerable.

Counterstatement of the Case

A. The Nature of Pay Cable:

Pay cable is an emerging auxiliary service offered by cable television systems. Such systems offer certain "basic services" to subscribers in exchange for a fixed monthly fee. (J.A., 34-35). Those basic services consist primarily of the retransmission by cable of over-the-air television programs from local and distant stations. This

retransmission service permits subscribers to obtain better reception of local over-the-air television programs and to receive programs from distant points which would otherwise be unavailable. In addition, cable television systems also provide certain programming originated for cable to all their subscribers without additional charge. The FCC has an elaborate regulatory framework governing all of these activities, which was adopted after consultation with Congress. See In Re Commission Proposals For Regulation of Cable Television, 31 F.C.C.2d 115 (1971); Cable Television Report and Order, 36 F.C.C.2d 143 (1972).

In recent years, a growing number of cable television systems have offered additional programming to those subscribers who desire it, for an additional charge. This service is known as "pay cable". As the District Court found (J.A., 153-54), pay cable offers home viewers throughout the country an opportunity to see new theatrical feature motion pictures, without commercial interruptions or editing; sports events not available on conventional television; and other forms of special entertainment, instructional and other programming and information. The prices charged to subscribers for movies and other entertainment fare have admit-

tedly been low.* The nature of the industry, which is a vital link in the national communications system and integrally related to broadcasting, has led the FCC to conclude that pay cable -- like over-the-air pay television -- should be left free from unnecessary price controls, so that the diverse programming it offers can become rapidly available to the maximum number of people who wish to subscribe to it.

Contrary to the State Commission's brief (p. 21), pay cable is not "essentially intrastate in nature." First, cable television systems have been held by the Supreme Court to be in interstate commerce because, inter alia, they transmit broadcast signals. United States v. Southwestern Cable Co., 392 U.S. 157, 168 (1968). Moreover, pay cable itself is an interstate industry.

* HBO costs only a fraction of regular box office prices -- about 20¢ to 30¢ per current movie for a family of four versus \$2 to \$4 per ticket at movie theatres. Indeed, New York City, which argued as amicus in support of defendants' jurisdictional theories below, specifically approved the policy of allowing pay cable prices to be set by free market operations. (Proposed Brief of Amicus New York City, June 4, 1976, p. 14.) And the National Association of Theatre Owners ("NATO") filed a petition before the State Commission to regulate pay cable prices on the theory that they are too low. The NATO petition is cited in the State Commission's "Clarification". (J.A., 70)

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Most pay cable subscribers in New York and other parts of the United States receive a channel of pay programs transmitted by HBO or by Showtime Entertainment Inc.* on national interstate networks by means of simultaneous transmissions via satellites, microwave and other interstate common carrier services licensed by the FCC. (J.A., 36-37, 62). See New York Times, October 26, 1977, p. C 28. For example, most New York subscribers receive pay cable service via a transmission path which goes through New Jersey. (J.A., 37). The FCC has recognized that pay cable is an integral part of the interstate-and national broadband cable system and that, in the words of Judge (now Chief Justice) Burger, "Fifty states and myriad local authorities cannot effectively deal with bits and pieces of what is really a unified system of communications" Memorandum Opinion and Order, 49 F.C.C.2d 1078, 1982 (1974), quoting from opinion in General Telephone Co. of Cal. v. FCC, 413 F.2d 390, 401 (D.C. Cir.), cert. denied, 396 U.S. 888 (1969).

The FCC and other governmental bodies and communications experts have all recognized that pay cable offers great potential for public good and more program diversity

* Showtime Entertainment Inc. is a subsidiary of Viacom International Inc., which is also the parent of Plaintiff Samson Cablevision Corp.

for viewers. This Court has also stressed that the commercial networks dominate the selection of programs today and that the public is entitled to a greater diversity of programs and sources of programs. Mt. Mansfield Television, Inc. v. FCC, 422 F.2d 470 (2d Cir. 1971); National Association of Independent Television Producers and Distributors ("NAITPD") v. FCC, 502 F.2d 249 (2d Cir. 1974) and 516 F.2d 526 (2d Cir. 1975). Pay cable provides for diversity in terms of programs, formats and time scheduling.

Pay cable faces vigorous competition from established media (including commercial television, theaters, sports arenas, closed-circuit theaters, books and newspapers), none of whose prices are controlled, and also from nascent media such as over-the-air pay television (which recently began operations in New Jersey and New York on UHF Channel 68); video discs and cassettes; and Sony's Betamax and similar videotape machines which are now being marketed on a mass basis. See Broadcasting, October 22, 1977, p. 28; Variety, Dec. 7, 1977, p. 1; New York Times, March 27, 1977, p. 54 and April 2, 1977, p. 44; Broadcasting, November 7, 1977, p. 38; The Wall Street Journal, October 3, 1977, p. 20; Barron's, March 21, 1977 p. 5. In view of these considerations, the FCC has determined that its statutory mandate will best be fulfilled if prices for pay programs, whether offered by over-the-air television systems or by cable television, are

not regulated at this stage, but are left to the marketplace. To that end, the FCC has preempted state and local regulation of pay program prices.

B. The FCC's Preemption

The record shows without the slightest doubt that the FCC has preempted rate regulation of pay cable services. The FCC has said so in plain language many times in official pronouncements beginning in 1969 and continuing to this year. It is sufficient to quote one such statement, made shortly before the present lawsuit began. In its First Report and Order on pay television and cablecasting, 52 F.C.C.2d 1, reconsideration denied, 54 F.C.C.2d 797 (1975), the FCC declared:

"216. As a final matter, we note that a number of cable television franchises contain provisions purporting to regulate subscription cable television or to ban the service entirely. We have specifically stated that '... the Commission has preempted the field of pay television cablecasting so that local franchise terms [purporting to regulate subscription cablecasting] are inoperative. . .' [quoting Time-Life Broadcast, Inc., 31 F.C.C.2d 747 (1971)] In paragraph 130 of the Cable Television Report and Order, the Commission stated:

. . . it is this Commission that must make the decisions as to conditions to be imposed on the operation of pay cable channels, and we have already taken steps in that direction. (See Section 76.225). Federal regulation is thus clearly called for.

"217. Although we have not ourselves undertaken the regulation of rates for the sale of subscription programming, we regard our prior statements concerning the regulation of subscription operations as preempting local regulation of rates as well as program content. We do not believe that regulation of subscription rates is either practicable or necessary at this time. The competitive alternatives to subscription television are plentiful, including most particularly free television, motion picture theaters, live sports, and other entertainment events. As we said with respect to over-the-air subscription rates:

The public is free to subscribe or not to subscribe to STV services. We believe that the marketplace will regulate the charges that are paid and that if they are excessive, the operations will not succeed. . .

In any case, we believe that the complex nature of subscription cablecasting and broadcasting, with implications not coincident with state boundaries, dictates that its regulation emanate from a single source, and that determinations as to when and how to regulate the service must be made at the federal level." (52 F.C.C.2d at 67-68) (Emphasis added; certain footnotes omitted) *

For other statements of the FCC's policy of preempting rate regulation of pay cable, see: Report and Order in Docket No. 21002, released September 30, 1977, p. 29, footnote 21; Notice of Inquiry in Docket No. 20767, 58 F.C.C.2d 915, 915-16 (1976); Clarification of the Cable Television Rules and Notice of Proposed Rulemaking and Inquiry, 46 F.C.C.2d 175,

* The State Commission participated in the proceeding resulting in this order and objected to FCC preemption of pay cable prices (see p. 19 below, fn.), but it did not seek judicial review of the FCC's decision.

186, 176 (1974); Cable Television Report and Order, 36 F.C.C.2d 143, 193 (1972); In Re Commission Proposals For Regulation of Cable Television ("Letter of Intent"), 31 F.C.C.2d 115, 130 (1971); CATV of Rockford, Inc., 38 F.C.C.2d 10 (1972), reconsideration denied, 40 F.C.C.2d 493 (1973); Lake County Cable TV, Inc., 28 Pike & Fischer Radio Reg. 2d 602 (1973); Request by Time-Life Broadcast, Inc., 31 F.C.C.2d 747 (1971); Clarification of CATV First Report, 20 F.C.C.2d 741 (1969). In addition, the FCC's intervention as a party plaintiff in this case is ample proof of the FCC's intention to preempt pay cable price regulation.

Of the above-cited statements of preemption, the 1971 Letter of Intent to Congress, 31 F.C.C.2d 115 (1971), is particularly important, for it shows that the FCC advised Congress of its preemption policy at an early date. Congress never disapproved of or questioned the FCC's statement that "[i]t is this Commission that must make the decision as to the conditions to be imposed on the operation of pay channels." 31 F.C.C.2d at 130. Such early consultation with Congress is entitled to significant weight. See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969).

The FCC's preemption policy is merely an extension of the identical policy which the FCC had previously adopted (and which had received judicial approval) with respect to over-

the-air pay television. In 1968, after a seventeen-year inquiry into over-the-air pay television ("STV") and after an extended dialogue with Congress, the FCC authorized over-the-air stations to provide a pay service and concluded that prices for the programs should be set by marketplace forces. The FCC stated:

"The public is free to subscribe or not to subscribe to STV services. We believe that the marketplace will regulate the charges that are paid that if they are excessive, the operations will not succeed." Fourth Report and Order, 15 F.C.C.2d 466, 548 (1968).

The Court of Appeals for the District of Columbia Circuit upheld the FCC's conclusions about free-market pricing in National Association of Theatre Owners v. FCC, 420 F.2d 194 (D.C. Cir. 1969), cert. denied, 397 U.S. 922 (1970) ("NATO") -- a precedent discussed in greater detail at pages 29-30 below.

The FCC's long-stated preemption policy on pay television and pay cable has been approved by every governmental and expert body which has considered this issue. Thus, the President's Cabinet Committee on Cable Communications strongly endorsed the federal prohibition of regulation of pay cable prices. Report to the President (1974), pp. 38-40. The Committee found that such regulation would be unnecessary and "inevitably would lead to regulation of program and information content, since rate regulation would ultimately have a bearing

on the nature, quantity and quality of the services being sold." Id. at 38-39. In a similar vein, it has been stressed by the FCC and by the Court of Appeals for the District of Columbia Circuit that no competing First Amendment medium is subject to price controls. (First Report and Order, 52 F.C.C.2d 1, 67-68 (1975); NATO, supra, 420 F.2d at 204.)

The FCC Advisory Committee on Federal/State-Local Regulatory Relationships, made up of representatives of the industry and of state and local governments, unanimously recommended continued federal preemption of pay cable in its 1973 report. Final Report of the FCC Cable Television Advisory Committee on Federal/State-Local Regulatory Relationships, Part I, pp. 8, 14.

And the 1976 Report of the staff of the Subcommittee on Communications of the House of Representatives Committee on Interstate and Foreign Commerce specifically approved Federal preemption of the pay cable area. The Subcommittee staff said: "We believe that the [FCC] has appropriately ruled out state/local regulation in several areas such as . . . the presentation of non-broadcast television programming like pay cable." Staff for the Subcommittee on Communications of the Committee on Interstate and Foreign Commerce, 94th Cong., 2d Sess., Cable Television: Promise Versus Regulatory Performance

(Subcommittee Print, January 1976) at 82.*

In short, the FCC has repeatedly and expressly preempted the field of pay cable price regulation and prohibited state or local price controls in favor of free marketplace forces; its action is identical with its prior policy in the area of over-the-air pay television; and this policy has won the unanimous support of cable television specialists at all levels of government. Indeed, the New York State Cable Commission is the only state agency in the United States to attempt to control prices in defiance of the FCC's policy.

In the face of this record, it is somewhat surprising to find the State Commission contending in this litigation that the FCC preemption does not exist. It is still more surprising in light of the facts that the state agency expressly opposed

* The State Commission's brief (pp. 16-17) quotes out of context general language from the Subcommittee staff report, without mentioning the report's explicit approval of the FCC's prohibition of state and local regulation of pay cable prices. Indeed, the State Commission's claim (Br., p. 17) that "the Subcommittee staff does not share the District Court's view that the FCC has preempted the entire field of pay cable regulation" is directly contradicted by the quotation in the text above.

this policy at FCC hearings;* the Commission's original 1973 Statement of Policy and its March 1, 1976 "Clarification" specifically noted the existence of a "purported" FCC preemption; and the Clarification invited a court test of it.

C. The Position of the State Commission

The State Commission was created by the New York Legislature in 1972, with power to regulate cable television operations in New York State. New York Executive Law, Article 28, §§ 811-31 (McKinney Supp. 1975). As the District Court noted (J.A., 164), the New York statute expressly recognizes that state regulation of cable must be "consonant with policies, regulations and statutes of the federal government" New York Executive Law, Article 28, § 811. When the state statute was enacted in 1972, the FCC had already preempted pay cable price regulation. Nevertheless, the State Commission stated in a 1973 Statement of Policy that it would undertake regulation of pay cable prices.

* See, testimony of Joel Yohalem, then General Counsel of the New York State Commission on Cable Television, in FCC Docket No. 19554, November 3, 1973, Tr. pp. 609-25 in which Mr. Yohalem stated that the State Commission disagreed with the FCC's prior policy of preemption, had issued its own Policy Statement of October 19, 1973 in which the State agency asserted jurisdiction to regulate pay cable rates, and concluded: "We are not ready to acquiesce in Federal preemption of our statutory authority at this point" (Tr. 618).

In Comments in FCC Docket No. 21002, dated February 28, 1977, the State Commission acknowledged that the FCC had taken "'preemptive' actions in such areas as the rates for premium programming . . ." (p. 14).

On March 1, 1976, the State Commission issued its "Clarification of Commission Policy" in a proceeding entitled In the Matter of Rates Charged by Cable Television Companies for "Auxiliary" Programming (Docket No. 90010). The "Clarification" (J.A., 68-74) reiterates in clear language that notwithstanding the FCC's express prohibition, the State Commission is undertaking to regulate the prices charged for pay cable programs. The State Commission said:

"The language of the Executive Law and our Rules clearly require all subscriber rates to be established or modified only through the local franchise and with our approval. Our October 19, 1973 pronouncements reiterated this position and made it clear that 'pay cable' services were not excluded.

"The sole basis for any contrary conclusion is the FCC's purported preemption of the field. However, our actions must be guided by our clear statutory mandate until such time as a court of competent jurisdiction has ruled that the FCC has, in fact, duly limited that statutory mandate. . . .

"Not only do we fail to agree with the legality of the FCC's pre-emptive policy; we also question its wisdom." (J.A., 72-73).

The "Clarification" went on to make clear that the State Commission would undertake "active enforcement" of its announced policy of pay cable price regulation. (J.A., 74).

The State Commission's "Clarification" purported to create two levels of price regulation for pay cable; prices

would be subject to approval of local franchising authorities -- not usually expert in rate regulation -- and of the State Commission itself. The "Clarification" has prompted several New York localities to seek to control the prices of pay cable programs. In two decisions, the courts have rejected such attempts.* The record shows that pay cable growth has been retarded in New York, but not in the rest of the country, because New York alone has created confusion and disincentives to risk money in this new venture by choosing to defy the FCC. (J.A., 76-77).

The District Court held that the State Commission's "Clarification" was "in clear conflict with federal policy" (J.A., 164). No other conclusion is possible.

Argument

I

THE FCC HAS EXPRESSED A CLEAR INTENTION TO PREEMPT PRICE REGULATION OF PAY CABLE SERVICES

Both the State Commission and NARUC contend on this appeal that the FCC has not sufficiently expressed its inten-

* See Good-Vue CATV, Inc. v. Baron, 76 Civ. 4730 (CES), United States District Court, Southern District of New York; Cohalan v. Petra Cablevision, Inc., Index No. 77-1583, Supreme Court of State of New York, Suffolk County.

tion to preempt price regulation of pay cable. This is a frivolous claim.

As pointed out above (pp. 13-15), the FCC has said in at least nine official pronouncements between 1969 and 1977 that it has preempted pay cable price regulation; it has entered this action as a party plaintiff to enforce that preemption. Indeed, the State Commission itself opposed the preemption policy before the FCC (see p. 19, above, footnote). It is well established that preemption of state and local regulation may be accomplished by expression of a federal intention to preempt, whether that expression appears in a Congressional statute or in the policies of an administrative agency like the FCC.* The expression of intention in this case could not be clearer.

Since the State Commission's "Clarification" expressly recognized the clash between federal and state policies (see p. 20 above), the District Court found that "the preemption or, as stated by the defendants' clarification, the 'purported preemption of the field', is virtually conceded." (J.A., 163). The only contrary argument made by appellants in this Court appears to be that the FCC has not acted with sufficient formality, because its preemption is not a specific regulation

* See, e.g. City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973); Campbell v. Hussey, 368 U.S. 297 (1961); Continental Air Lines v. CAB, 522 F.2d 107 (D.C. Cir. 1975).

embodied in a "CFR Section". (State Commission Br., pp. 24-25; NARUC Br., p. 21) No authority is cited, however, for the suggestion that a CFR section is an indispensable prerequisite of preemption. Here, the preemption is not found in an offhand or informal remark, but in carefully considered statements of policy contained in many published reports, orders and other official documents over a period of almost a decade.

The law is clear that official agency action can occur by means of policy statements in absence of regulations. The contrary argument was specifically rejected in Continental Air Lines, Inc. v. CAB, 522 F.2d 107, 124 (D.C. Cir. 1975). There, the Court of Appeals, en banc, reviewed CAB policy statements and rejected the agency's claim of lack of ripeness:

"The label an agency attaches to its action is not determinative. The action may be reviewable even though it is merely an announcement of a rule or policy that the agency has not yet put into effect." (footnotes omitted).

The same principle was recently recognized in National Association of Regulatory Utility Commissioners v. FCC, 525 F.2d 630 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976) ("NARUC I"),* where there were statements of FCC preemption but no regulations to that effect. There, the FCC

* This case is cited as "NARUC I" to distinguish it from the later case of the same name ("NARUC II"), reported at 533 F.2d 601 (D.C. Cir. 1976). NARUC I is further discussed at pages 32-33 below; NARUC II is discussed at pages 40-41.

stated in its opinion that rates for land mobile services (e.g., radio dispatch services in taxicabs, trucks, etc.) should not be regulated at the federal or state level because free-market conditions would stimulate growth of new communications facilities. The Court of Appeals upheld the FCC's preemption, and the Supreme Court denied certiorari. The teaching of NARUC I applies here.

II

THE PREEMPTION OF PAY CABLE PRICE REGULATION IS WITHIN THE JURISDICTION OF THE FCC

The District Court correctly perceived that the only real issue in this case is whether the FCC's preemption of pay cable price regulation falls within its broad jurisdiction over national communications. (J.A., 158). The District Court also correctly found that that question is answered in the affirmative by the two leading Supreme Court cases on cable television regulation, United States v. Southwestern Cable Co., 392 U.S. 157 (1968) and United States v. Midwest Video Corp., 406 U.S. 649 (1972). Those cases, read together, establish that the FCC has jurisdiction to regulate cable television to the extent that such regulation is "reasonably ancillary" to the FCC's authority over broadcasting; and that regulation of cable which is designed, like the preemption at issue in this case, to enhance program diversity is within the "reasonably ancillary"

test. Indeed, this Court has recognized that the FCC's duty to stimulate diversity is the "paramount" goal under the Communications Act and the First Amendment. Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470, 477 (2d Cir. 1970); NAITPD v. FCC, 502 F.2d 249 (2d Cir. 1974) and 516 F.2d 526 (2d Cir. 1975). Accordingly, the FCC's jurisdiction to preempt is clear.

A. Southwestern Cable and Midwest Video

In Southwestern Cable, the Supreme Court upheld FCC restrictions on the importation by cable companies of distant signals into certain television markets. The Southwestern Court was the first to set forth the "reasonably ancillary" test, holding that the FCC's jurisdiction over cable television was "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting" (392 U.S. at 178). The Court also stressed that "CATV systems are engaged in interstate communication" and that the FCC "was expected to serve as the 'single Government agency' with 'unified jurisdiction'" in formulating "'a unified and comprehensive regulatory system'" (392 U.S. at 168).*

* quoting President Roosevelt's message to Congress recommending the Commission's creation, H.R. Rep. No. 1850, 73d Cong., 2d Sess., 1 and S. Rep. No. 781, 73d Cong., 2d Sess. 1; footnotes omitted).

Midwest Video, as the Court of Appeals for the District of Columbia Circuit has noted, "takes a giant step beyond Southwestern."* In Midwest, the Supreme Court upheld FCC rules requiring cable systems to originate their own programs (such as pay programs) on channels not used for transmission of broadcast signals.** The Court reasoned that mandatory origination of non-broadcast programs (including subscription programs) would provide viewers with a greater diversity of programs and program sources; that increasing diversity was a principal goal of regulation in the broadcast field; and that therefore the FCC's mandatory origination rules were "reasonably ancillary" to the agency's basic policies in broadcasting. The Court noted that the FCC had stated that cablecasting had the potential "'to further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services'" (406 U.S. at 654). The Court added:

"Equally plainly the broadcasting policies the Commission has specified are served by the program-origination rule under review. To be sure, the cablecasts required may be transmitted without use of the broadcast spectrum.

* National Association of Regulatory Utility Commissioners v. FCC, 533 F.2d 601, 615 (D.C. Cir. 1976) ("NARUC II").

** The State Commission is incorrect in stating that Midwest dealt with regulations "related to signal carriage" (Br., p. 15).

But the regulation is not the less, for that reason, reasonably ancillary to the Commission's jurisdiction over broadcast services. The effect of the regulation, after all, is to assure that in the retransmission of broadcast signals viewers are provided suitably diversified programming -- the same objective underlying regulations sustained in National Broadcasting Co. v. United States, supra,* as well as the local-carriage rule reviewed in Southwestern and subsequently upheld." (Id. at 669)

The above language is applicable here. Although pay cable, like the rule at issue in Midwest, may not directly involve the "use of the broadcast spectrum", preemption of pay cable price regulation is not the less "reasonably ancillary" to the FCC's paramount goal of stimulating diversity in its pervasive regulation of broadcasting. The effect of that preemption, like that of the origination requirements in Midwest Video, is "to assure that in the retransmission of broadcast signals viewers are provided suitably diversified programs" (406 U.S. at 669).

The State Commission (Br. p. 15) and NARUC (Br. p. 11) seek to minimize the precedential value of Midwest by pointing to the closeness of the vote and the Chief Justice's statement in his concurring opinion that the decision strained the outer limits of the FCC's jurisdiction. But Midwest is a fortiori here. If, as Midwest holds, the FCC

* 319 U.S. 190 (1943).

can compel cable television companies to originate programs, the FCC certainly has the power to determine that the provision of these services shall be free from state and local price regulations which could, in the FCC's expert view, interfere with the achievement of national statutory policies. As the Supreme Court stressed in Southwestern, the FCC has a duty to make such informed judgments as to the future impact of cable (392 U.S. at 176-77). The program origination requirement in Midwest and the preemption of pay cable price regulation at issue here are both designed to stimulate the growth of the emerging cable television technology as part of a national broadcast communications system in which television viewers will have available the broadest possible range of programming.* The FCC's power to exercise its regulatory authority for that purpose is clearly established by Midwest.

B. Other Cases Supporting
The FCC's Jurisdiction

Three Court of Appeals cases -- National Association

* Report to the President of the Cabinet Committee on Cable Communications (1974) at 4; Cable Television: Promise Versus Performance, prepared by the Staff of the Subcommittee on Communications of the Committee on Interstate and Foreign Commerce, 94th Cong. 2d Sess. (Subcommittee Print) (1976) at 3; Committee for Economic Development, Broadcasting and Cable Television: Policies for Diversity and Change (1975) at 13; Bazelon, FCC Regulation of the Telecommunications Press, 1975 Duke L.J. 213 at 223 (1975).

of Theatre Owners v. FCC, 420 F.2d 194 (D.C. Cir. 1969), cert. denied, 397 U.S. 922 (1970) ("NATO"), American Civil Liberties Union v. FCC, 523 F.2d 1344 (9th Cir. 1975) ("ACLU") and National Association of Regulatory Utility Commissioners v. FCC, 525 F.2d 630 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976) ("NARUC I") -- confirm what is apparent from Southwestern and Midwest: that preemption of pay cable price regulation is within the FCC's broad jurisdiction.

(1) NATO

NATO, as noted above (p. 16), upheld the FCC's 1968 decision that prices charged for over-the-air pay television services (subscription television or "STV") should be left unregulated. In upholding the FCC's determination against imposing price controls, the Court of Appeals for the District of Columbia Circuit said:

"We are not prepared to hold that the Commission was arbitrary and capricious in determining that a substantial amount of economic competition would exist between STV and other forms of entertainment and enlightenment available in the community. Courts should be very reluctant, we think, to declare that free market forces must be supplanted by rate regulation when neither Congress nor the agency administering the area has found that such regulation is essential." Id. at 204. (footnote omitted).

NARUC (Br., pp. 13-14) reads NATO as standing for the proposition that the FCC has power to regulate rates only where

a monopoly is found to be present. The issue here, however, is not the FCC's power to regulate prices, but its power to free pay cable from premature and unnecessary price regulation. NARUC's argument suggests the nonsensical conclusion that the FCC could preempt price regulation, and thus permit the operation of free market forces, only upon a finding of monopoly. In other words, according to NARUC, New York State is free to impose price control because there is no monopoly, but could not impose price control if monopoly were found.

The true significance of NATO for this case is that, as the District Court noted (J.A., 162), the FCC policy at issue here is simply an extension to cable of the very same policy which has already received judicial approval in the context of over-the-air television. The pay cable preemption is not just "ancillary" to pay television regulation: it is identical. Indeed, it would be anomalous if prices charged for "All the President's Men" on UHF Channel 68 -- a new STV channel now operating in New York -- were left to normal market-place forces whereas the price for the film on HBO's pay cable were set by a bureaucrat. If pay cable prices were regulated, but STV prices were not, competitive realities would probably prevent over-the-air pay prices from exceeding the regulated level, thus vitiating the "free market" policy which NATO approved.

(2) ACLU

The FCC's discretion to permit free market experimentation for pay cable is also supported by the Ninth Circuit's opinion in ACLU, supra, 523 F.2d 1344. In that case, the ACLU attacked the FCC's policy, adopted in the 1972 Cable Report, 36 F.C.C.2d 143, reconsideration denied, 36 F.C.C.2d 326 (1972), not to impose common-carrier regulations on access channels, including leased access channels used for pay cablecasting by lessees.* The Court, noting that it would be improper for it to substitute its judgment for the expertise of the FCC, stated:

"[The FCC's] approach, as reflected by regulatory structure here sketched, is to impose relatively few restrictions on the use of access channels and await the results of the private ordering which time and experience will provide. Specifically, it recognizes that while common carrier status may become an appropriate regulatory structure in the future, the present is better served by rules which allow the forces of the market place to function freely. Rate regulation in the absence of experience it believes would be detrimental to the development of cable television." (523 F.2d at 1349; emphasis added; footnote omitted).

The Court held that the FCC's opting for free-market experimentation rather than premature regulation was "a rational choice" (Id. at 1350), noting among other things that the

* Some pay cable services are offered by third parties who lease channels from the cable system owners. See Broadcasting Cable Sourcebook 1977 at 338.

Report to the President by the Cabinet Committee on Cable Communications (1974), discussed above (pp. 16-17), "recommended against regulation by any governmental authority of the prices charged to subscribers and channel users" because such regulation would inevitably influence content of the programs. (523 F.2d at 1350; emphasis added; citation omitted).

(3) NARUC I

The FCC's preemption of local rate regulation to nurture a new medium, an objective stressed in ACLU, is not unprecedented. Similar FCC preemption was upheld in NARUC I, supra, 525 F.2d 630, by the Court of Appeals for the District of Columbia Circuit. There, the FCC had authorized a new category of land mobile radio services known as SMRS to provide services to third parties. The Court noted:

"Because it seeks to utilize a profit motive to speed development and refinement of mobile radio technologies, the Commission concludes that SMRS should not be subject to the common carrier regulations of Title II of the Communications Act and that state certification of SMRS should be preempted." (525 F.2d at 635; footnotes omitted).

The FCC's decision to free SMRS from rate regulation and other obligations imposed on common carriers was found in NARUC I to be "reasonably necessary in order to create the atmosphere of free entry and competition which the Commission

had determined is desirable as a means of maximizing the development of mobile radio technology." (525 F.2d at 646). The FCC action at issue here is also designed to create an "atmosphere of free entry and competition" in the pay cable area, and should likewise be upheld.

C. Authorities Cited
By Appellants

NARUC relies heavily upon the recent decision of the Court of Appeals for the District of Columbia Circuit in Home Box Office Inc. v. FCC, 75 Civ. 1280, decided March 27, 1977, not yet officially reported, cert. denied, 46 U.S.L.W. 3216 (October 3, 1977) ("HBO") and the State Commission and NARUC also rely upon National Association of Regulatory Utility Commissioners v. FCC, 533 F.2d 601 (D.C. Cir. 1976) ("NARUC II"). Neither of these decisions, however, and none of the other cases cited by appellants, is inconsistent with the District Court's decision in this case. Indeed, HBO and NARUC II are not only consistent with but give further support to the correctness of the decision below. HBO holds that cable is entitled to full First Amendment protections and should be left to free market forces without premature bureaucratic restraints until there is an empirical evidence demonstrating an overriding need for regulation. And NARUC II expressly recognizes that the FCC has broad powers when

dealing with cable's origination of programs to promote diversity for viewers.

(1) HBO

NARUC (Br. pp. 16-18), but not the State Commission, relies heavily upon HBO, decided by the Court of Appeals for the District of Columbia Circuit on March 25, 1977, shortly after the decision below. In fact, HBO provides

powerful support for the District Court's decision. For HBO held that pay cable, like newspapers, was entitled to full First Amendment protection (Slip Op. at 72) and that it should be allowed to develop in a free marketplace like other media -- that there should be "a period of unregulated experimentation" (Slip Op. n. 60). Thus, HBO, like the FCC policy upheld in this case, opts for free market operations for a First Amendment medium free of premature and chilling restraints.

HBO involved the FCC's so-called "antisiphoning rules" -- a complex set of regulations which severely limited the motion pictures and sports events that could be exhibited on pay cable, on the theory that they might otherwise be "siphoned" from commercial television. The rules also prohibited advertising on pay cable and limited the amount of total programming which could be devoted to movies and sports combined. Plaintiffs here and the Justice Department (which

appears in this case as a plaintiff supporting the FCC's prohibition of price regulation) opposed the FCC's attempt to control the program content of pay cable in HBO.

In a 105-page opinion, the Court of Appeals invalidated the program-content rules on a series of independent grounds, any one of which would have been sufficient standing alone. The Court held that the FCC regulated without adequate data, having chosen to regulate without first allowing a period of unregulated experimentation; that the FCC's rules violated the First Amendment, because they constituted an unjustified prior restraint on free speech and were grossly overbroad; that the record failed to demonstrate that "siphoning" constituted a real threat; that the FCC failed to consider the anticompetitive impact of the antisiphoning rules; and that the proceedings before the FCC were flawed by ex parte contacts by interested parties with the FCC and its staff. As an additional ground, the Court held that the FCC lacked jurisdiction to promulgate the antisiphoning rules in light of the inadequacy of record support for those rules and the sensitive First Amendment considerations that were involved. The Court was at pains, however, to stress the limited nature of its jurisdictional holding:

"Although we hold today that the Commission has not established its jurisdiction on the record evidence before it, we think it important to note

the limits of our holding. We do not hold that the Commission must find express statutory authority for its cable television regulations. Such a holding would be inconsistent with the nature of the FCC's organic Act and the flexibility needed to regulate a rapidly changing industry. However, we do require that at a minimum the Commission, in developing its cable television regulations, demonstrate that the objectives to be achieved by regulating cable television are also objectives for which the Commission could legitimately regulate the broadcast media. Where the First Amendment is involved, more will be required. See Part III infra. Further, we require that the Commission state clearly the harm which its regulations seek to remedy and its reasons for supposing that this harm exists. Because our holding is so limited, it is possible that the Commission will, after remand, be able to satisfy the jurisdictional prerequisites for regulating pay cable television." (Slip Op. p. 48) (emphasis added).

It is plain from the above language that the Court's holding that the FCC lacks jurisdiction to impose the program-content rules at issue in HBO was based upon circumstances peculiar to the HBO decision, which are not present here. Among the specific distinctions between HBO and this case are the following:

1. In HBO, the Court was unable to find "that the objectives to be achieved" by the challenged regulations were "also objectives for which the [FCC] could legitimately regulate the broadcast media." The Court noted that the antisiphoning rules were designed to eliminate any competition between pay cable and advertiser-supported television, concluding: "How such an effect furthers any legitimate goal of the Communications Act is not clear." (Slip Op. p. 35)

Here, by contrast, the FCC's preemption of price regulation is designed to enhance program diversity -- a goal sanctioned by the Supreme Court decision in Midwest Video and by HBO itself -- by promoting free and direct competition, unfettered by price control, between pay cable and other First Amendment media which are not subject to price controls.

2. The HBO Court's holding on the issue of jurisdiction was also expressly influenced by the fact that the regulations at issue in HBO restricted the exercise of First Amendment freedoms. "Where the First Amendment is involved," the HBO court said, "more will be required" to establish jurisdiction. (Slip Op., p. 48) Thus, the limitation on program content involved in HBO was subjected to an especially stringent test.

Here, the FCC's preemption of state and local price regulation does not interfere with anyone's First Amendment freedoms. On the contrary, it promotes First Amendment values by furthering the growth of the pay cable medium, which will make movies, sports events and other entertainment more widely available to home television viewers. Indeed, as stressed by the Cabinet Committee on Cable Communications and by the FCC itself, controlling prices of movies, sports and other programs may have a chilling effect on the content of pay cable programs. The Cabinet Committee Report to the President (1974) stated:

"Government regulation of [pay cable] prices inevitably would lead to regulation of program and information content, since rate regulation would ultimately have a bearing on the nature, quantity and quality of the service being sold." (at 38-39)

3. The HBO court did not find that the entire matter of pay cable was beyond the FCC's jurisdiction. The Court disclaimed any such intention. Rather, the court simply declared that the need for the program-content rules, particularly in view of the strong First Amendment considerations and the FCC's refusal to allow "a period of unregulated experimentation" (Slip Op. n. 60), was not established on the record before the court. In this case, as we shall demonstrate in Point III, the sufficiency of the record before the FCC is not in issue; this is a collateral attack on the FCC's preemption, not an appeal from an FCC ruling. In any event, as Point III also shows, the FCC's preemption -- its allowing pay cable "a period of unregulated experimentation" -- is supported by common sense, ample record evidence and judicial precedents. (See pp. 45-49 below).

4. The HBO Court stressed in support of its holding on the jurisdictional issue that the FCC's antisiphoning rules were not a reflection of a "well-understood and consistently held policy developed in the Commission's regulation

of broadcast television" (Slip Op. p. 34).^{*} The opposite is true here. As the District Court pointed out (J.A., 162) and as shown above (pp. 15-16), the FCC's policy against price controls of pay television was first developed in the broadcast area and has been consistently applied to both cable and over-the-air services.

HBO is not only distinguishable from, but supports, the District Court's in the present case. A key basis for the HBO decision was that the FCC had imposed rules without first permitting "a period of unregulated experimentation in which data could be generated that could form a predicate for informed agency action." (Slip Op. n. 60). A second major theme was that cable was entitled to full First Amendment protection (Slip Op. 72). Thus, HBO stands for the proposition that the FCC should not impose unnecessary regulation, particularly where First Amendment issues are at stake, without at least allowing some time to see what happens in the absence of regulation. Here, the FCC has acted in complete harmony with this principle, by declaring that pay cable prices should remain, at least for the present, free from any chilling price controls, whether federal, state or local.

^{*} The Court, in explanation, referred to the FCC's traditional unwillingness to interfere with entertainment formats of broadcasters (Slip Op. pp. 36-42).

(2) NARUC II

In NARUC II, the Court held that the FCC's ancillary jurisdiction did not cover burglar alarms, fire alarms and similar two-way, point-to-point, non-video communications on cable channels -- i.e., communications sent from one location on a cable system to a central location. Thus NARUC II did not involve program services for the viewing public but communications which the NARUC II majority found to be more analogous to common carrier or telephone transmissions. (533 F.2d at 609).* The District Court in the present case distinguished NARUC II by saying: "The nexus between broadcasting purposes and 'leased access channels for two-way, point-to-point, non-video communications' which was found to be so patently missing in NARUC [II] is obviously present in pay cable TV." (J.A. 162; footnote omitted). We submit that this distinction is clearly sound.**

* The State Commission's reliance on the common carrier provisions in Title II of the Communications Act (Br. pp. 18-19) is misplaced. The FCC exercises ancillary jurisdiction over cable's retransmission of television signals and origination of programs (such as pay programs) under Title III which bestows broad powers over broadcasting.

** NARUC itself has demonstrated its ability to distinguish between the burglar alarms involved in NARUC II and the pay cable programming at issue here. Preemption of state and local regulation in both areas was expressed in the same 1974 FCC Clarification (46 F.C.C.2d 175 and 49 F.C.C.2d 1078). The NARUC II decision was rendered on NARUC's appeal from so much of those orders as purported to preempt regulation of the two-way non-video communications. NARUC did not appeal from the portion of the 1974 orders preempting regulation of pay cable prices.

The significance of NARUC II in this case is that it recognized the broad scope of the FCC's power over cable television under Midwest Video. NARUC II, which the State Commission states "provides the best clarification of the FCC's cable television authority" (Br. p. 19), declares:

"Midwest, without question, takes a giant step beyond Southwestern, in relaxing the nature of the ancillarity necessary to support an assertion of Commission power over cable. As we read the case, it turns upon a determination that 'ancillary to broadcasting' means not only 'for the protection of broadcasting,' but also embodies any regulation of cable which in its own right serves the purposes pursued by broadcast regulation. Since a prime purpose in the area of broadcast regulation is the assurance of variety in what appears on the home viewer's screen, the Court concluded that an origination requirement aimed at providing 'suitably diversified programming,' is within the ancillarity standard." (533 F.2d at 615; emphasis added; footnotes omitted.)

This language supports the FCC's preemption of local regulation of pay cable prices, which is aimed at "the assurance of variety in what appears on the home viewer's screen."

(3) Other Authorities

There is no need for extended discussion of the other authorities on which appellants rely. Chief among these are Head v. New Mexico Board of Examiners, 374 U.S. 424 (1963) and TV Pix, Inc. v. Taylor, 304 F. Supp. 439 (D. Nev. 1968), aff'd, 396 U.S. 556 (1970). (State Commission Br., pp. 13-14; NARUC Br., pp. 8, 20.) As the District Court noted (J.A., 163), these cases held not that the FCC lacked jurisdiction to

preempt state or local regulation but that it had not, on the facts of those cases, chosen to do so. Head has no bearing at all on the issue of jurisdiction; and TV Pix expressly recognized in dictum the FCC's power to preempt regulation of cable television -- a power which the FCC had not exercised in 1968. See 304 F. Supp. at 465.

* * * *

In sum, every relevant authority supports the conclusion of the District Court, based upon the Supreme Court decisions in Southwestern Cable and Midwest Video, that preemption of state and local regulation of pay cable prices is within the jurisdiction of the FCC. Because the District Court correctly decided this dispositive issue, its judgment should be affirmed.

III

NARUC'S CLAIM THAT THE FCC ACTED
ON AN INSUFFICIENT RECORD IS NOT
PROPERLY BEFORE THIS COURT, AND
IS WITHOUT MERIT IN ANY EVENT

NARUC claims (Br., pp. 22-26) that the FCC's preemption policy is not supported by sufficient evidence and asks this Court to review such action as if NARUC had filed a petition for review of the various FCC opinions establishing

the preemption policy.* NARUC's claim must be rejected for three independent reasons:

1. NARUC was a party to several of the FCC proceedings in which the preemption policy was adopted, and failed to seek reconsideration or appeal from its adoption. It is not now free to subject that preemption policy to collateral attack.

2. NARUC did not attack the sufficiency of the FCC record in the District Court, and cannot do so for the first time on this appeal.

3. If the issue were to be considered on the merits, the facts overwhelmingly support the FCC's policy.

A. NARUC May Not Collaterally
Attack FCC Determinations
From Which It Did Not Appeal

From the early days of the FCC's inquiries into cable television regulation, NARUC participated in FCC proceedings and urged a non-preemption policy. See NARUC's Comments in Docket No. 18892, October 7, 1970, pp. 13-18; and

* The State Commission does not appear to make a similar claim. If it did, however, the arguments made in the text would be equally applicable. The State Commission, like NARUC, was a party to the FCC proceedings in which the preemption policy was adopted. See, e.g. testimony of Joel Yohalem, Esq. in hearings in FCC Docket 19554, quoted at p. 19 above; The New York State Commission on Cable Television Comments in FCC Docket No. 21002, February 28, 1977, also quoted at p. 19 above.

NARUC's Comments in Docket No. 18397, September 5, 1969, pp. 9, 11, 13. For example, NARUC's 1970 comments before the FCC referred to NARUC's model statute "providing for State regulation of CATV systems as public utilities" and stated that the FCC should not "smother local initiative and responsibility by seeking Federal preemption" (pp. 14, 16). The FCC dockets in which NARUC participated led to adoption of the 1972 Cable Television Report (36 F.C.C.2d 143), after consultation with Congress (Letter of Intent, 31 F.C.C.2d 115 (1971)). That landmark Report rejected NARUC's proposal for public-utility regulation and preempted state and local regulation of pay cable. (36 F.C.C.2d 143, 193). As noted above (p. 40, fn), NARUC did successfully appeal from the 1972 Report as it related to non-video services like burglar alarms, but did not appeal from the FCC rulings on pay cable preemption.

NARUC thus chose not to pursue the exclusive remedy provided by statute for review of FCC orders and is barred from a collateral attack on the sufficiency of the record before the FCC. The Communications Act, 47 U.S.C. § 402(a) (1962, Supp. 1976), provides in pertinent part:

"Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission . . . shall be brought as provided by and in the manner prescribed in [28 U.S.C. § 2342]."

The Administrative Orders Review Act, 28 U.S.C. § 2342 (Supp. 1977), provides in pertinent part:

"The court of appeals has exclusive jurisdiction to . . . determine the validity of (1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of Title 47."

Under the above statutes, review of FCC orders by means other than one expressly provided for is barred. See Port of Boston Marine Terminal Ass'n v. Rederi Transatlantic, 400 U.S. 62, 69, 71 (1970) (order of the Federal Maritime Commission); Moirisseau v. Mt. Mansfield Television, Inc., 380 F. Supp. 512, 515 (D. Vt. 1974) (Oakes, J.) (order of the FCC). See also, Investment Company Institute v. Board of Governors, 551 F.2d 1270 (D.C. Cir. 1977) (regulation and interpretive ruling of the Federal Reserve Board); Kesinger v. Universal Airlines, Inc. 474 F.2d 1127, 1132 (6th Cir. 1973); (order of the Civil Aeronautics Board); Note, Jurisdiction to Review Federal Administrative Action: District Court or Court of Appeals, 88 Harv. L. Rev., 980, 982-983 (1975).

While we have assumed that the State Commission and NARUC may argue in this case that the FCC exceeded the boundaries of its subject matter jurisdiction*, it is clear that the sufficiency of the record on which the FCC exercised its jurisdiction must be litigated in an appeal from the FCC order, if at all. Indeed, a contrary rule would make no sense. The

* But see CIBA Corp. v. Weinberger, 412 U.S. 640 (1973); Yakus v. United States, 321 U.S. 414, 444-446 (1944).

FCC record was not before the District Court and is not before this Court. NARUC cannot rationally ask that the sufficiency of the record be determined in this proceeding.

B. NARUC Seeks To Raise In This Court An Issue Not Raised Below

The second reason why NARUC's claim of an insufficient FCC record must be rejected is that NARUC did not make this contention in the District Court. NARUC is thus violating the basic principle that claims not presented to the District Court may not be raised for the first time on appeal.

Singleton v. Wulff, 428 U.S. 106, 119-21 (1976); Hormel v. Helvering, 312 U.S. 552, 556 (1941); Jhirad v. Ferrandina, 536 F.2d 478, 486 (2d Cir. 1976); Wilkerson v. Meskill, 501 F.2d 297, 298 (2d Cir. 1974); Terkildsen v. Waters, 481 F.2d 201, 205 (2d Cir. 1973).

C. There Is Ample Basis For The FCC's Preemption Policy

Finally, even if NARUC's claim that the FCC's preemption is not supported by sufficient evidence were to be considered on the merits, the result could not be in doubt. There is ample basis for the FCC's conclusion that to allow pay cable to operate in a free marketplace environment without price controls will enhance the growth of the medium and the diversity of programs.

Indeed, detailed analysis of the facts is hardly required to provide a reasonable basis for the belief that a young industry, subjected to vigorous competition from other communications media, where prices are not controlled, will be injured by price control. NARUC itself admits (Br., p. 13) that pay cable is not in a "monopolistic" position -- and that monopoly is the chief justification for price regulation. Price control by bureaucrats in states and localities across the country will inevitably be cumbersome, harmful and inhibiting to this new communications mode. To permit such price controls, particularly as to a service which is largely provided through national networks, would conflict with Judge (now Chief Justice) Burger's statement that "[F]ifty states and myriad local authorities cannot effectively deal with bits and pieces of what is really a unified system of communications." General Telephone Co. of Cal. v. FCC, 413 F.2d 390, 401 (D.C. Cir.), cert. denied, 396 U.S. 888 (1969). Such regulation would also conflict with the cardinal principle of communications law, stated in FCC v. Sanders Brothers Radio Station, 309 U.S. 470 (1940), that free market forces should normally govern this field.

Recent marketplace developments also make it clear that state and local price regulation would be inappropriate. First, the advent of Betamax and other videotape recorders

and video cassettes, featuring motion pictures and other entertainment shown on a television set, subjects pay cable to still more intense competition from a brand new and unregulated communications media. Second, since the District Court's decision, over-the-air pay television has become a reality; it is available in the New York market on UHF channel 68. Third, while most pay cable systems have historically offered their subscribers a single channel of programs for a single monthly fee (See J.A., 154), a major "per-program" pay cable service has recently been launched. See New York Times, August 24, 1977, p. C19; Broadcasting, November 21, 1977, pp. 42-43. If price regulation is applied to such a service, state and local regulators will have to decide what price may be charged for "Rocky"; what price for an obscure foreign language film; and what price for a karate lesson. To put such decisions in the hands of local bureaucrats, we respectfully submit, would be folly.

Apart from such general arguments, however, the FCC's long and careful study of the industry, and its duty to make widespread judgments as to the future developments of new technologies, support its preemption of pay cable rate regulation. The data which led the FCC to this decision were put before the Court below in summary form in the affidavit of James R. Hobson, Acting Chief of the FCC's Cable Television

Bureau. (J.A., 99-133) We respectfully refer to Mr. Hobson's affidavit, and to the FCC's brief on this appeal, for a demonstration that the FCC's preemption of pay cable television regulation is fully justified by the facts. The FCC had the duty to "forecast" the outcome of its policies (See Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470, 483-84 (2d Cir. 1971)) and there is no basis for NARUC's claim that the FCC acted unreasonably in doing so.

* * *

NARUC's argument that the FCC preemption lacks factual support is made to the wrong forum, and is wrong on the merits. It furnishes no ground for reversing the decision below.

Conclusion

For the foregoing reasons, we respectfully submit that the judgment of the District Court should be affirmed.

Dated: New York, New York
December 16, 1977

Respectfully submitted,

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
Attorneys for Plaintiffs-Appellees

Stuart Robinowitz
Robert S. Smith
Susan P. Carr
Jack A. Horn

Of Counsel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- - - - - x

BROOKHAVEN CABLE TV, INC., et al., :

Plaintiffs-Appellees, :

and :

DOCKET NO. 77-6156
DOCKET NO. 77-6157

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION, :

Plaintiffs-Intervenors-
Appellees, :

AFFIDAVIT

-against- :

ROBERT F. KELLY, et al., :

Defendants-Appellants, :

and :

NATIONAL ASSOCIATION OF REGULATORY
UTILITY COMMISSIONERS, :

Defendant-Intervenor-
Appellant. :

- - - - - x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

PHILIP E. ALTILAND, being duly sworn, deposes and
says:

I am not a party to the action, am over 18 years
of age and reside at 77 Seventh Avenue, New York, New York
10011.

On December 16, 1977, I served the Brief of Plaintiffs-Appellees Brookhaven Cable TV, Inc., et al., upon the following attorneys at the address designated by them for that purpose:

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Said service was made by depositing a true copy of the Brief of Plaintiffs-Appellees Brookhaven Cable TV, Inc., et al., enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Philip E. Altman

Sworn to before me this
16th day of December, 1977.

Susan P. Carr

Notary Public

SUSAN P. CARR
Notary Public, State of New York
No. 31-9822996
Qualified in New York County
Commission Expires March 30, 1978

Docket No. 77-6156

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Plaintiffs-Appellees,
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UNITED STATES OF AMERICA and
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Defendants-Appellants,
and

NATIONAL ASSOCIATION OF REGU-
LATORY UTILITY COMMISSIONERS,
Defendant-Intervenor-Appellant.

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